United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6041

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA and DONALD M. CERRA,
Special Agent of the Internal Revenue Service,

Petitioners-Appellees

v.

JOHN L. BEATTIE, JR.,

Respondent-Appellant

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

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STATEMENT OF THE ISSUE PRESENTED

Whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusing to comply with an Internal Revenue Service summons requiring the production of an accountant's workpapers which were used in the preparation of the claimant's prior tax returns, where, upon becoming aware that he was the subject of a tax investigation, the claimant procured the workpapers from his accountant.

STATEMENT OF THE CASE

This is an appeal from an order (R. 17-18) [1] of the United States District Court for the Western District of New York (Honorable Harold P. Burke), entered on May 16,1975, requiring John L. Beattie, Jr., to comply with an Internal Revenue Service summons by producing certain accountant's workpapers in his possession. A notice of appeal was filed on May 27, 1975. (R. 23.) [2] Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

The facts may be summarized as follows:

Sometime in early January, 1974, Special Agent Donald M. Cerra of the Internal Revenue Service, accompanied by another agent of the Service, interviewed John L. Beattie, Jr. (hereinafter taxpayer) at his office in Rochester, New York. (R. 14; I-Tr. 4.) [3] The agents advised taxpayer, inter alia, that they were investigating his federal income tax returns for the years 1968 through 1972, and that he had a right to remain silent and to retain counsel. (R. 14; I-Tr. 4.) Thereafter, taxpayer contacted his attorney, James W. Richards, and, on

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1/ "R." references are to the separately bound record appendix.

2/ On June 16, 1975, this Court stayed enforcement of the District Court's order pending the determination of the appeal. At the same time, this Court expedited the appeal and ordered the filing of simultaneous briefs on July 7, 1975.

3/ "I-Tr." refers to the transcript of proceedings, held on January 27, 1975, on the order directing taxpayer to show cause why he should not comply with the summons..

January 18, 1975, Richards requested taxpayer's accountant, Arthur W. Robeson, to deliver to him for delivery to the taxpayer certain workpapers which Robeson had prepared. (R. 14, 16; I-Tr. 4.) The accountant delivered the workpapers to Mr. Richards and he then delivered them to the taxpayer. (R. 14, 16; I-Tr. 4.)

On September 13, 1974, Agent Cerra issued an Internal Revenue Service summons to taxpayer. (R. 7.) The summons directed taxpayer to appear before Agent Cerra on September 23, 1974, and to testify and to produce the workpapers of the accountant which were in his possession. (R. 6.)[4/] Taxpayer appeared on the specified date but asserted the Fifth Amendment privilege against self-incrimination in justification of his refusal to comply with the summons. (R.13,15.)

Subsequently, on January 7, 1975, pursuant to the provisions of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954 (26 U.S.C.), a petition (R. (R. 3-5) was filed in the court below seeking judicial enforcement of the summons. The petition was supported by Agent Cerra's affidavit (R. 7-8),

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4/ The summons sought the production of the following records (R.

> All original workpapers of Arthur Robeson, C.P.A. which are in your possession and were used in the preparation of Form 1040 U.S. Individual Income Tax Return of John L. Beattie, Jr. and Margaret Beattie for the years 1968, 1969, 1970, 1971 and 1972 consisting of but not limited to the following: trial balances, balance sheet, adjusting entries, closing entries, workpapers, notes, memorandums and any correspondence used in the preparation of the aforementioned returns.

in which Cerra stated that he is a special agent of the Internal Revenue Service; that, in his capacity as a special agent, he was assigned to investigate the federal income tax liabilities of taxpayer for the years 1968 through 1972; that, pursuant to such investigation, he issued and served the summons at issue; that taxpayer appeared at the time and place directed by the summons but refused to comply therewith; and, that the testimony and documents demanded by the summons were "necessary for the determination of the federal income tax liabilities of John L. Beattie, Jr., for the years 1968, 1969, 1970, 1971 and 1972." An order (R. 2) then issued on January 7, 1975, requiring taxpayer to appear before the United States District Court for the Western District of New York on January 27, 1975, and to show cause why he should not comply with the summons.

An answer (R.9-11) was filed by the taxpayer on January 14, 1975. In his answer, taxpayer asserted, inter alia, that Agent Cerra was conducting an investigation "for the principal purpose of determining whether to recommend that criminal prosecution be instituted * * * with respect to the tax returns filed by * * * [taxpayer] for the years 1968 through 1972, inclusive;" that the records sought by the summons were the property of taxpayer and were in his lawful possession; that taxpayer "has a privilege under the Fifth Amendment * * *, and has properly asserted said privilege, to decline to give testimony and/or to produce for examination the books, records and other papers, demanded by said summons;" and, "that the

summons is over-broad, lacks the specificity required by law, and that the documents demanded therein are not reasonably necessary to said investigation."[5/]

A hearing on the order to show cause was held on January 27, 1975. Neither party presented any evidence, but instead restricted their presentation to legal argument directed to the Fifth Amendment point. (See I-Tr.) Subsequently, on May 16, 1975, the District Court entered an order (R. 17-18) overruling the claim of Fifth Amendment privilege, as well as the other grounds set forth in taxpayer's answer, and directing compliance with the summons. This appeal followed.

5/ The answer was supported by, inter alia, the affidavits of taxpayer and of Robeson, his accountant. Taxpayer's affidavit (R. 14-15) stated that the records sought by the summons were in his possession, that it was his intent and understanding that he was entitled to have the summoned records as his "sole property" and that his refusal to produce the records and testify was based upon the Fifth Amendment privilege against self-incrimination. The accountant's affidavit stated that (R.16) it was his feeling that, since taxpayer had paid him for his accounting services, taxpayer was entitled to have the summoned records, and that he (the accountant) had no need for the papers and had not had any need for them since he had given them to taxpayer's attorney.

SUMMARY OF ARGUMENT

The issue in this case involves the enforceability of an Internal Revenue Service summons seeking the production of workpapers originating with taxpayer's accountant--papers which pertained to the accountant's preparation of the taxpayer's income tax returns. In our view, the transfer of the accountant's workpapers to the taxpayer did not create a privilege against self-incrimination which did not theretofore exist. As the Supreme Court reaffirmed in Couch v. United States, 409 U.S. 322 (1973), the Fifth Amendment privilege against self-incrimination is an intimate and personal right. Where that Court has extended the privilege to cover documentary evidence, it has repeatedly emphasized that only personal records are eligible for the claim. The decisions of the Supreme Court reflect the consistent view that the privilege should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records" (United States v. White, 322 U.S. 694, 701 (1944)).

Under the standards developed in the Supreme Court's decisions, the accountant's workpapers at issue are not the personal papers of the taxpayer and are therefore not subject to a claim of privilege on behalf of the taxpayer. On numerous occasions, it has been held that the Fifth Amendment is no bar to the required production of third-party records that might incriminate the claimant. Such third-party records cannot be transformed into the claimant's personal records simply by

placing them in his custody. In determining whether records in the possession of the claimant are subject to the privilege, the Supreme Court has looked to the essential character of the documents, notwithstanding even claims by individuals to their legal title. For example, in Grant v. United States, 227 U.S. 74 (1913), the Court held that records of a dissolved corporation in the possession of an individual shareholder pursuant to his claim of exclusive title were not subject to the privilege against self-incrimination because the documents retained their "essential character" as corporate documents.

Similarly, in Bellis v. United States, 417 U.S. 85 (1974), the Supreme Court concluded that a member of a dissolved partnership could not claim the privilege to avoid producing partnership records which he had appropriated to his own possession prior to the issuance of a grand jury subpoena. The Court held that the records remained partnership records and that the claimant (and co-owner of the records), accordingly, was holding them in a representative capacity rather than as his own private or personal papers.

Thus, even if the accountant in this case had transferred title in his workpapers to the taxpayer, the privilege would not have become available, since such a transfer of title would not have converted the accountant's papers to the private papers of the taxpayer.

It would ill serve the policy underlying the privilege if a person under investigation could gather documentary evidence into his possession from third parties and then claim the

privilege against self-incrimination with respect to such material. If the privilege could become available by means of such a simple expedient, the distinction developed by the Supreme Court between third-party records and private papers would be rendered meaningless. As Mr. Justice Holmes admonished for a unanimous Court in Matter of Harris, 221 U.S. 274, 279-280 (1911), "The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story." Since the accountant's workpapers (complied from unprivileged information previously disclosed to him by the taxpayer) are not the taxpayer's private papers, the taxpayer has no greater right to withhold them from proper legal process than does the custodian of corporate, organizational or partnership records or the possessor of any other pertinent unprivileged evidence.

The unavailability of the privilege against self-incrimination to convert accountant's workpapers to the client's private papers is further demonstrated by the Supreme Court's decision in Schmerber v. California, 384 U.S. 757 (1966). There, the Court held that the unconsented taking of a blood sample from a person under arrest for the purpose of conducting a chemical analysis of its alcoholic content was not barred by the privilege even though such evidence might serve to incriminate the accused. The Court stated that "[t]he distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not

violate it." (384 U.S., p. 764.) As in Schmerber, the production of the accountant's workpapers in this case would not require the taxpayer to make any self-incriminating disclosures of a testimonial or communicative nature. In complying with the summons by producing the workpapers, the taxpayer would not be authenticating the workpapers or testifying about them in any manner. Indeed, only the accountant could provide authentication and his testimony would not violate the taxpayer's Fifth Amendment privilege. Since it is only compulsion of testimony by the claimant which is prohibited by the Fifth Amendment, the privilege is unavailable to bar enforcement of the summons in this case.

ARGUMENT

A TAXPAYER'S PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT A BAR TO REQUIRED PRODUCTION OF HIS ACCOUNTANT'S WORKPAPERS WHICH THE TAXPAYER OBTAINED AFTER LEARNING THAT HE WAS THE SUBJECT OF A TAX INVESTIGATION

A. Introduction

The primary basis asserted in the court below for taxpayer's refusal to comply with the summons was the claim that production of the accountant's workpapers in the possession of the taxpayer was barred by the taxpayer's privilege against self-incrimination under the Fifth Amendment.[6/] In support of this proposition, taxpayer relied upon the cases of United States v. Kasmir, 499 F. 2d 444 (C.A. 5, 1974), cert. granted, 420 U.S. 906 (1975),[7/]

6/ Although the affidavits submitted in support of the taxpayer's answer do not indicate that any defense other than that based upon the Fifth Amendment was offered in support of the refusal to comply with the summons in taxpayer's appearance before Agent Cerra, the answer also asserted that (R.) the summons was "over-broad, lacks the specificity required by law, and that the documents demanded therein are not reasonably necessary to said investigation." These claims are clearly without merit. Obviously, the accountant's workpapers used in the preparation of the taxpayer's income tax returns for the years 1968 through 1972 are relevant to an investigation of taxpayer's tax liabilities for the same years. See Foster v. United States, 265 F. 2d 183, 187 (C.A. 2, 1959), cert. denied, 360 U.S. 912 (1959). The claim of overbreadth is similarly without support. Any claim that production would place an undue burden upon taxpayer disappears in light of the apparent ease with which the summoned records were transferred from the accountant to the attorney to the taxpayer. The claim of lack of specificity is simply frivolous. In the affidavit of taxpayer's attorney (R. 13), it is stated that taxpayer admitted to Agent Cerra "that the documents and records described in the summons were in his possession."

7/ Consolidated with United States v. Fisher, 500 F. 2d 683 (C.A. 3, 1974), cert. granted, 420 U.S. 906 (1975).

and United States v. Cohen, 388 F. 2d 464 (C.A. 9, 1967). It is our position that those cases were wrongly decided.[8] Irrespective of where title to these workpapers now rests,[9] we believe it clear that the act of obtaining possession of an accountant's workpapers does not change the essential character of those records and convert them into the personal and private papers of the possessor such that his personal privilege against self-incrimination can serve to bar their production.

8/ The facts in those cases are much similar to the facts here. In Kasmir, immediately after being contacted by special agents of the Service and shortly before service of the summons, the workpapers were transferred from the accountant to the taxpayer and then to the attorney. 499 F. 2d, p. 446. Relying upon the decision in Couch v. United States, 409 U.S. 322 (1973), the Fifth Circuit (in a two-to-one opinion) concluded that the taxpayer's Fifth Amendment privilege was available to bar compulsory production once he obtained possession of the accountant's workpapers and that they remained in his "constructive possession" upon transfer to his attorney. In Cohen, the taxpayer obtained possession of his accountant's workpapers immediately after being contacted by special agents of the Service and retained them in his possession. 388 F. 2d, p. 465. The Ninth Circuit upheld the taxpayer's claim of privilege, concluding that "possession of papers sought by the government, not ownership, * * * sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit" (388 F. 2d, p. 468).

9/ This question was not resolved in the lower court. Taxpayer stated in his affidavit that (R.15) "it was * * * [his] understanding and intent that, inasmuch as * * * [he] had paid Mr. Robeson for the preparation of these papers, together with other accounting services, * * * [he] was entitled to have them as * * * [his] sole property and that they therefore constituted * * * [his] sole property." In his affidavit, the accountant stated that (R.16) "[s]ince Mr. Beattie had paid me for my accounting services, including the preparation of these papers, I felt that he was entitled to have them if he so desired." Obviously, neither of these statements establish that title to these papers, which were created and long-maintained by the accountant, passed to the taxpayer. The point, in any event, is not material, since, in our view resolution of the issue before this Court does not depend upon whether or not the claimant has title to the summoned records.

B. The privilege against self-incrimination does not apply to possessory interests in documents which are not held in a purely personal capacity

1. The issue raised in this case is of major importance to the conduct of federal tax investigations by the Internal Revenue Service. In Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.), Congress has authorized the Secretary of the Treasury or his delegate, in discharging his responsibility to administer and enforce the revenue laws, "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry; * * * [and] [t]o summon * * * any person having possession, custody, or care of books of account * * * or any other person * * * to appear before the Secretary * * * at a time and place named in the summons and to produce such books, papers, records, or other data, * * * as may be relevant or material to such inquiry * * *." Such summonses are administratively issued, and the Internal Revenue Service can seek their enforcement in the federal courts. Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954 (26 U.S.C.). As the Supreme Court observed in United States v. Bisceglia, 420 U.S. 141, 146 (1975), "[t]he purpose of the statutes is not to accuse, but to inquire. Although such investigations unquestionably involve some invasion of privacy, they are essential to our self-reporting system * * *."

While records sought by an Internal Revenue Service summons may tend to incriminate the taxpayer under investigation, the decisions of the Supreme Court have established that the Fifth Amendment privilege against self-incrimination is not available to prevent the compulsory production of documents unless they are the private papers of the claimant of the privilege and are in his possession. These decisions reflect the Court's consistent view that the privilege should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records" (United States v. White, 322 U.S. 694, 701 (1944)).

In Couch v. United States, 409 U.S. 322, 327, 328 (1973), the Supreme Court reaffirmed that the Fifth Amendment privilege is an "intimate and personal" right which "adheres basically to the person, not to information that may incriminate him." In referring to its previous holding in Boyd v. United States, 116 U.S. 616 (1886), that a person could not be compelled to produce his private papers[10/] that might tend to incriminate him,

10/ The holding in Boyd cannot be characterized as extending the privilege to records prepared by a third party. While the document sought in Boyd was an invoice issued to the claimant's partnership by a third party, the Supreme Court has subsequently explained that the question of whether the invoice was a private business record was not raised in that case. Bellis v. United States, 417 U.S. 85, 95, fn. 2 (1974). It was treated as private by the parties (with the Government arguing instead that the privilege did not apply to in rem proceedings, see Shapiro v. United States, 335 U.S. 1, 33, fn. 42 (1948)). "The Court therefore decided the case on the premise that it involved the 'compulsory productin of a man's private papers.'" 417 U.S., p. 95, fn. 2. Thus, in extracting the essential passage from the Boyd decision which was descriptive of its holding, the Court in Couch cited Boyd as deciding that "any forceable

the Court in Couch pointed out that "[a] later Court commenting on the Boyd privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity.' United States v. White, 322 U.S. 694, 699 (1944) (Emphasis added.)" 409 U.S., p. 330, fn. 10. Since Boyd did not "address or contemplate the divergence of ownership and possession" (409 U.S., p. 330), the Supreme Court rejected its application in Couch, where the owner of books and records had transferred them to an accountant. In these circumstances, the Court in Couch concluded that "the ingredient of personal compulsion against an accused is lacking" (409 U.S., p. 329) and the taxpayer-claimant therefore could not invoke the privilege as a bar to the compelled production of her records by the accountant.

While Couch involved absence of possession by the claimant of documents owned by him, the privilege is similarly unavailable in the converse situation where the claimant has physical possession but cannot assert that they are his own personal papers. In these circumstances, the claimant's possession is

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10/ (continued)
and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" (116 U.S., p. 630) would violate the Fourth and Fifth Amendments. See 409 U.S., p. 330. See also Wilson v. United States, 221 U.S. 361, 380 (1911); United States v. Onassis, 125 F. Supp. 190, 208 (D.C. D.C., 1954).

custodial rather than personal.[11] Accordingly, as was recently noted in Bellis v. United States, 417 U.S. 85, 88-90 (1974), a long line of Supreme Court decisions holds that an individual cannot rely upon the privilege to avoid producing the records of a collective entity (such as a corporation, unincorporated association or partnership) which are in his possession in a representative capacity, even if those records would incriminate him personally. See, e.g., United States v. White, supra; Wilson v. United States, 221 U.S. 361 (1911).

2. In applying the rule that records in the possession of the claimant are not subject to the privilege unless he can demonstrate that they are his personal papers, the Supreme Court has been careful to classify documents in accordance with their essential character, notwithstanding claims by individuals to legal title of the documents. For example, in Wheeler v. United States, 226 U.S. 478, 482-483, 486 (1913), and Grant v. United States, 227 U.S. 74, 76-78 (1913), where corporations had been dissolved by the time the subpoenas had been served and individual shareholders asserted ownership rights in the corporate records sought,[12] the Supreme Court nevertheless rejected

11/ Of course, if the claimant can assert neither possession nor ownership of papers, they are simply third-party records with respect to which the privilege is unavailable. See, e.g., Donaldson v. United States, 400 U.S. 517, 537 (1971) (Justice Douglas concurring); California Bankers Assn. v. Shultz, 416 U.S. 21, 55 (1974). See also Johnson v. United States, 228 U.S. 457, 458 (1913).

12/ In Grant, the subpoena was served on the attorney for the corporation's sole stockholder. See 227 U.S., pp. 76-77.

their claims of privilege. It held that the documents retained their "essential character" as corporate documents (226 U.S., p. 490; 227 U.S., p. 80) and "were still impressed with the incidents attending corporate documents (226 U.S., p. 490), and therefore did not qualify as private papers. This was the case even though the individual then in possession (or constructive possession, in Grant) of them also claimed, and was assumed by the Court, to be their owner (226 U.S., p. 490; 227 U.S., p. 80).

Similarly, in Bellis v. United States, supra, a member of a dissolved partnership could not claim the privilege to avoid production of records belonging to his former partnership which he had appropriated to his own possession prior to the issuance of a grand jury subpoena. The Supreme Court held that the records remained partnership records, in which the other partners had important legal rights, and that the claimant, accordingly, was holding them in a representative capacity rather than as his own private or personal papers (see 417 U.S., pp. 97-99).

Wheeler, Grant and Bellis establish that documents do not become "private" or "personal" for Fifth Amendment purposes merely because the claimant physically possesses them, even if that possession is under a claim of title. Here, the records at issue are accountant's workpapers which were created by the accountant and were owned and maintained by the accountant until the commencement of the investigation. They obviously were not private papers of the taxpayer and, we submit, did not become

so upon being handed over by the accountant to the taxpayer. We turn now to a detailed consideration of the essential character of the papers at issue and whether their transfer effected a change in that character for purposes of the Fifth Amendment.

C. The client's privilege against self-incrimination does not extend to accountant's workpapers which are placed in the custody of the taxpayer-client

1. The Fifth Circuit in United States v. Kasmir, supra, p. 451, correctly acknowledged that the taxpayer in that case could have claimed no privilege of self-incrimination in the accountant's workpapers had the summons been served while they were held by the accountant. The decision in Couch established that a taxpayer's own books and records are not protected when they are in the possession of an accountant, and it follows a fortiori that compelled production of accountant's workpapers which belonged to the accountant and were never in the possession of the taxpayer-claimant would not constitute "extortion of information from the accused himself that offends our sense of justice" (Couch v. United States, supra, p. 328). Indeed, this result is merely an application of the well-settled rule that third-party records are not subject to a claim of privilege. See fn. 11, supra. Simply put,"[t]here is no right to be free

from imcrimination by the records or testimony of others." Donaldson v. United States, 400 U.S. 517, 537 (1971) (Justice Douglas concurring).[13/]

Although there is no dispute concerning the correctness of the preceding proposition, the Fifth Circuit in Kasmir went on to state that: "It is likewise clear from Couch that at the time the taxpayer obtained actual possession of the records, the day before the summons was served, he was in the position to assert his Fifth Amendment privilege, if the summons had then been served" (499 F. 2d, p. 451). In the Fifth Circuit's view, had the taxpayer at that point placed the material in a safe under his control, "he could have successfully invoked the privilege by relying upon his constructive possession" (Ibid.).

This statement by the Court of Appeals in Kasmir seriously misinterprets the teaching of Couch. That case dealt with books and records which belonged to and originated with the taxpayer, and as to which the privilege presumably would have been available to her had she not relinquished possession of them. See Couch v. United States, supra, p. 334, fn. 18. In rejecting her claim of privilege with respect to records of the taxpayer which she had disclosed to her accountant and permitted him to maintain continuously in his possession,

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13/ There is, of course, no accountant-client privilege under federal law and no state-created privilege is generally recognized in federal cases. See Couch v. United States, supra, p. 335, and cases cited therein.

the Court in Couch emphasized that the accountant, and not the taxpayer, was the only person who would be subject to the compulsion of the summons. Once the taxpayer had voluntarily removed her records from that "'private enclave where [she] may lead a private life * * *'" (Murphy v. Waterfront Comm'n., 378 U.S. 52, 55 (1965), quoting United States v. Grunewald, 233 F. 2d 556, 581-582 (C.A. 2, 1956), rev'd, 353 U.S. 391 (1957)), "the ingredient of personal compulsion against an accused [was] lacking" (409 U.S., p. 329). See 409 U.S., p. 338 (Justice Brennan concurring).

While the lack of possesion by the owner of documents was significant in the circumstances presented in Couch, the Supreme Court's opinion in that case does not support the converse conclusion of the Fifth Circuit in United States v. Kasmir, supra, that physical possession alone is a sufficient basis for invoking the privilege with respect to documentary evidence. It would ill serve the policy underlying the privilege if a person under investigation could gather documentary evidence into his possession from third parties and then claim the privilege against self-incrimination with respect to such material. If the privilege could become available by means of such a simple expedient, the distincition which the Supreme Court has developed between third-party records and private papers would be rendered meaningless. As Mr. Justice Holmes admonished for a unanimous Court in Matter of Harris, 221 U.S. 274, 279-280 (1911) "[t]he right not to be compelled to be

a witness against oneself is not a right to appropriate property that may tell one's story."

Indeed, the present case would appear to follow a fortiori from Wheeler v. United States, supra, and Grant v. United States, supra, which held that even if the claimant could assert both a proprietary and a possessory interest in documents which are not his personal papers, such documents are not subject to a claim of the privilege. That principle was in no way repudiated by Couch and was subsequently reaffirmed in Bellis v. United States, supra, p. 97, fn. 8, as the basis for denying a claim of privilege by a co-owner in possession of the records of a partnership or other unincorporated association. And in Grant, supra, the records of a dissolved corporation which were in the possession of its sole shareholder under a claim of exclusive title were held not subject to the privilege because of their "essential character" as corporate documents. Thus, even if the accountant in this case had transferred title in his workpapers to the taxpayer,[14/] the privilege would not have become available; the transfer of title would not have converted the character of the accountant's workpapers to the private papers of the taxpayer. Such a transfer surely could not create a privilege which theretofore did not exist. The Fifth Circuit in Kasmir clearly erred in concluding that the accountant's workpapers would have been privileged in the hands of the taxpayer.

14/ As previously noted, the question of where the title to these workpapers now rests was not resolved in the court below.

In light of the foregoing, it is not surprising that, apart from the decision in Kasmir, the federal appellate courts that have considered the applicability of the privilege to an accountant's workpapers transferred to the taxpayer or to his attorney, either directly or indirectly, have, with a single exception, uniformly rejected any claim of privilege on behalf of the taxpayer.[15/] The single contrary appellate authority is United States v. Cohen, supra. There, in anticipation of an Internal Revenue Service summons, the taxpayer had acquired his accountant's workpapers and thereafter claimed the privilege. Relying upon the testimony of the accountant that he considered all papers relating to his client's affairs to be theirs to command and that it was his unvarying practice to deliver such papers to the client when requested, the Ninth Circuit upheld the claim of the privilege, concluding that the taxpayer's possession "[c]ould not fairly be characterized as wrongful" (388 F. 2d, p. 470).

While this case may be distinguished factually from Cohen on the basis of the practice of the accountant with respect to his workpapers vis-a-vis his client (and possibly the ownership

15/ In additon to the decision in United States v. Fisher, supra, see, e.g., Deck v. United States, 339 F. 2d 739 (C.A. D.C., 1964), cert. denied, 379 U.S. 967 (1965) (workpapers transferred first to the taxpayer and then to his attorney); United States v. Zakutansky, 401 F. 2d 68 (C.A. 7, 1968), cert. denied, 393 U.S. 1021 (1969) (accountant's workpapers transferred to taxpayer); United States v. Widelski, 452 F. 2d 1 (C.A. 6, 1971), cert. denied, 406 U.S. 918 (1972) (accountant's workpapers transferred to taxpayer); United States v. White, 477 F. 2d 757 (C.A. 5, 1973), aff'd per curiam, 487 F. 2d 1335 (C.A. 5, 1973) (en banc), cert. denied, 419 U.S. 872 (1974) (accountant's workpapers transferred to taxpayer's attorney).

of the papers (see fns. 9, 14, supra)), we believe that the Ninth Circuit's decision is erroneous on the broader ground that accountant's workpapers cannot be transformed into the private papers of his client.[16/] As we have pointed out above (pp. 15-17, supra), the decisions of the Supreme Court in Wheeler, Grant and Bellis have made it clear that the question is not whether the claimant's possession of the documents is wrongful, but whether they are his private papers. Workpapers prepared by an outside accountant are not private papers of the client to whom they pertain. The mere fact that such records may reflect the taxpayer's financial transactions does not in itself create a Fifth Amendment privilege to bar their disclosure. See, e.g., Couch v. United States, supra; California Bankers Assn. v. Shultz, 416 U.S. 21 (1974); Donaldson v. United States, supra, p. 537 (Justice Douglas concurring). And, since the workpapers at issue were prepared by the accountant on the basis of information disclosed to him by the taxpayer-client for purposes of preparation of the client's tax returns, the following analysis by the Supreme Court in Couch concerning

16/ The reference to Cohen in Couch v. United States, supra, p. 330, fn. 12, noted that "the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate." But the Court in Couch further noted (Ibid.) that it was not deciding "what qualifies as rightful possession enabling the possessor to assert the privilege." On the latter issue, the Ninth Circuit's view has been criticized by other courts of appeals. See United States v. Widelski, 452 F. 2d 1, 5 (C.A. 6, 1971), cert. denied, 406 U.S. 918 (1972), and cases cited therein. Moreover, the Ninth Circuit's statement in Cohen that the privilege does not depend upon "the degree of privacy which attended the creation or maintenance of particular records" (388 F. 2d, p. 471) is contrary to both Couch and Bellis.

a taxpayer's own records furnished to an accountant for those purposes is at least equally applicable here (409 U.S., pp. 335-336):

> [T]here can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's. Indeed, the accountant himself risks criminal prosecution if he willfully assists in the preparation of a false return. 26 U.S.C. § 7206(2). His own need for self-protection would often require the right to disclose the information given him. Petitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here cannot reasonably claim, either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality. (Footnote omitted.)

Moreover, the Supreme Court noted in Couch that no confidential accountant-client privilege exists under federal law and no state-created privilege has been recognized in federal cases (see 409 U.S., p. 335, and cases cited therein). Thus, whether the accountant's workpapers are in the hands of his client or of the accountant, the client cannot prevent his accountant from testifying about them or claim a privilege of confidential communication to prevent their production, because the law does not recognize any significant interest of privacy by the client in his accountant's workpapers.

There is no reason for a different rule under the Fifth Amendment--a rule that would protect from production accountant's workpapers in the hands of the client, even though the client could not prevent his accountant's testimony with respect to such records or the information they contain. The transfer of the workpapers to the client's custody does not change their essential nature; they remain a compilation by the accountant of unprivileged information previously disclosed to him by the client. Although the client may have a Fifth Amendment privilege to refuse to authenticate the workpapers or testify about their contents (see point 2, infra, pp. 24-27), the papers themselves are not converted into part of the "private enclave where he may lead a private life" merely by being placed in his possession. Since they are not his private papers, he has no greater right to withhold them from proper legal process than does the custodian of corporate, organizational or partnership records (see Wheeler, Grant, White and Bellis, supra) or, indeed, the possessor of any other pertinent evidence (see Warden v. Hayden, 387 U.S. 294, 302-303 (1967)).

2. The unavailability of the privilege against self-incrimination to convert accountant's workpaper's to the client's private papers is further demonstrated by the Supreme Court's decision in Schmerber v. California, 384 U.S. 757 (1966). There, the Court held that the unconsented taking of a blood sample from a person under arrest for the purpose of conducting a chemical analysis of its alcoholic content was not barred by

the privilege. Although such evidence may serve to incriminate the accused, the Court stated that "[t]he distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." (384 U.S., p. 764). Since admission of the blood test evidence did not involve either testimony or any communicative act or writing by the claimant, it was not barred by the prvilege against self-incrimination. See also Warden v. Hayden, supra (clothing); United States v. Dionisio, 410 U.S. 1, 5-7 (1973) (voice exemplars); United States v. Mara, 410 U.S. 19, 21-22 (1973) (handwriting exemplars).

As in Schmerber, the production of the accountant's work-papers in this case would not require the taxpayer to make any self-incriminating disclosures of a testimonial or communicative nature.[17/] In complying with the summons by producing the work-papers, the taxpayer would not be authenticating the workpapers or testifying about them in any manner. It is that testimonial compulsion which is prohibited by the Fifth Amendment.[18/] As the

17/ The taxpayer's earlier communications to the accountant, on which the workpapers were based, were, of course, neither privileged nor compelled by the Government.

18/ The summons here (R. 6) sought not only the production of documents but also "testimony relating to the tax liability." Any question, however, as to the giving of testimony, apart from the act of producing the records, is not now before this Court. Taxpayer must appear before the agent and elect to take or not to take the privilege against self-incrimination as to each question asked. In re Turner, 309 F. 2d 69 (C.A. 2, 1962). See also United States v. Bell, 448 F. 2d 40 (C.A. 9, 1971); United States v. Roundtree, 420 F. 2d 845 (C.A. 5, 1969).

Supreme Court stated in United States v. White, supra, p. 698, the privilege "is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." (Emphasis added.)

In this case, only the accountant could provide authentication of his workpapers and his testimonial communication would not violate the taxpayer's privilege against self-incrimination. Indeed, the sole testimonial disclosure which would accompany the taxpayer's production of the summoned workpapers would be the admission that they were in his possession, a fact that is already admitted (see R. 13, 15) and which, in any event, is of no evidentiary significance and would therefore not be incriminating. Accordingly, since "[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused" (Schmerber v. California, supra, p. 765) would accompany production of the accountant's workpapers, the privilege is unavailable to bar enforcement of the summons. See also

Couch v. United States, supra, p. 329; United States v. Fisher, 500 F. 2d 683, 692-694 (C.A. 3, 1974) (en banc), cert. granted, 420 U.S. 906 (1975); VIII Wigmore on Evidence (McNaughton rev., 1961), § 2263, p. 379.[19/]

CONCLUSION

For the foregoing reasons, it is submitted that the order of the District Court should be affirmed.

Respectfully submitted,

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19/ In addition to the question of the availability of the Fifth Amendment privilege to bar production of the accountant's work-papers, the Government is also arguing in the Kasmir case that the claimant's attorney could not invoke the privilege on behalf of the client. There, of course, the records were in the possession of taxpayer's attorney and the summonses were served upon the attorney and the accountant. The taxpayer did not attempt to intervene in the enforcement proceedings. Here, of course, the summoned records were in the possession of the taxpayer and the summons was served upon him. Taxpayer filed an affidavit (R. 14-15) in which he asserted the Fifth Amendment. There is, however, nothing in the record which indicates whether or not the taxpayer appeared at the enforcement proceedings. In any event, the Government did not in the proceedings below either raise the point or demand a personal invocation of the privilege in open court. We do not intend that anything contained in this brief should be taken as a concession on this point.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this _____ day of July, 1975, in an envelope, with postage prepaid, properly addressed to him as follows:

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